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No. 1268

In the Supreme Court of the United States

OCTOBER TERM, 1968

MAURICE H. KOWAN,
Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Respondent.

On Appeal From The Appellate Department, Superior Court, Los Angeles County, California — Case No. CR A 7658.

JURISDICTIONAL STATEMENT

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NO.

MAURICE H. KOWAN,
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vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Respondent.

On Appeal From The Appellate Department, Superior Court, Los Angeles County, California — Case No. CR A 7658.

JURISDICTIONAL STATEMENT

(Submitted pursuant to Rules 13 (2) and 15 of the United States Supreme Court Rules)

Dr. Maurice H. Kowan, defendant and appellant, appeals from the judgment entered November 18, 1968, of the Appellate Department, Superior Court, Los Angeles County, California, affirming his conviction at a jury trial on six of twelve counts of the amended complaint. Dr. Kowan

herewith submits this statement showing that this Honorable Court has jurisdiction of the appeal and that very substantial Federal issues are involved.

(a) MEMORANDUM OPINION AND JUDGMENT OF LOWER COURT

The memorandum opinion and judgment of the lower court were unreported, and appear herein as Appendix "A".

(b) JURISDICTION

(i) Nature of Proceeding and Statutes Involved

This is a "free speech" case if there ever was one! Defendant and appellant, a duly-licensed California physician, stands convicted before this Court *solely and only* for what he allegedly said about "Laetrile", a cancer medication he employed in his medical practice. Involved herein is the vital question of whether or not a physician trained and licensed to treat the sick may be prosecuted for "crime" because his stated professional opinions and views may conflict with those of the State.

Dr. Kowan was prosecuted by the State of California, under Section 1714, California Health and Safety Code, and Section 26286, California Health and Safety Code, for alleged "willful and false" statements concerning Laetrile, and alleged verbal "false advertisements" of Laetrile, respectively, as made to a paid "informer" posing as a patient, and hired by the State to gather evidence against defendant and appellant.* A lengthy jury trial took place,

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*Note: Dr. Kowan was also prosecuted for "petty theft" based upon his modest professional charges to the "informer" witness, but conviction on these four counts was reversed by the Appellate Department.

at which, to establish "falsity" of Dr. Kowan's ostensible professional statements and opinions, various medical witnesses called by the State gave opinions disputing the merits of Laetrile as a cancer therapy. On the other hand, defense medical witnesses were unanimous in praising Laetrile as a valuable cancer therapy, and Laetrile was shown to have achieved international recognition and commendation in this regard.

Defendant and appellant contends that Sections 1714 and 26286 of the California Health and Safety Code are *per se* unconstitutional. He also contends that the procedures employed against him under said statutes violated his constitutionally-guaranteed rights. In one particular, the State, in its Health and Safety Code, provided detailed administrative procedures to protect rights of physicians, and thereunder before any doctor could be barred from recommending a cancer therapy, he was entitled to a full hearing on the merits of the therapy, to be followed by a formal "cease and desist" order in the event of an adverse ruling, the order being subject to subsequent court review. Then, and only then, could a doctor be deemed "on notice" that his recommendation of a specific therapy could violate any law. No "cease and desist" order was ever obtained against Dr. Kowan as to Laetrile.*

On the four occasions when the State's "informer" witness visited Dr. Kowan's offices, he carried with him electronic "eavesdropping" equipment with which the statements of defendant and appellant were broadcast to a nearby automobile. As a substantial and important subsidiary question involved herein, defendant and appellant

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* The statutory provisions referred to are included herein as "Appendix 'C' ".

contends that this "unreasonable search and seizure" of his conversations violated his Constitutional rights.

Throughout the trial, the prosecutor grossly misconducted himself through injection of prejudicial matter, and by inflammatory and grossly improper argument to the jury. Additionally, there was a complete and total insufficiency of any evidence upon which a valid conviction could be based. As a further substantial and important subsidiary question, Dr. Kowan submits that these and other circumstances denied to him the fair trial and due process to which he was entitled under the U. S. Constitution.

Defendant and appellant submits that this case is of far-reaching importance, since if he may be convicted of "crime" because of opinions expressed pursuant to his medical judgment and discretion, any other doctor can suffer a like fate. And, if freedom of communication between doctor and patient is destroyed through fear of State prosecution, then the patient as well must suffer the consequences of a state-dictated "orthodoxy" in medical matters.

(ii) Judgment Sought to Be Reviewed

The judgment (with opinion) sought to be reviewed was entered by the Appellate Department of the Superior Court on November 18, 1968, affirming the conviction of defendant and appellant at a jury trial in the Los Angeles Municipal Court as to counts 1, 2, 4, 5, 7 and 8 of the amended complaint, and reversing as to counts 3, 6, 9, 10, 11 and 12. Said judgment is included herein as Appendix "A". The trial Judge, Honorable James Harvey Brown, had sentenced Dr. Kowan on September 15, 1967 to serve 180 days in the Los Angeles County Jail as to each count. suspending execution partially upon specified conditions,

including payment of fines. The full text of the trial court order is included herein as "Appendix 'B' ".

Said appellate department denied rehearing on December 6, 1968. Notice of appeal to this Court was thereafter filed in the Appellate Department on February 18, 1969. Subsequent thereto, defendant and appellant applied herein for an extension of time to docket the above cause, Mr. Justice William O. Douglas granting said application and extending the time to and including April 15, 1969.

(iii) Statute Conferring Jurisdiction

Jurisdiction of this Court is conferred by Section 1257 (2), Title 28, United States Code, which provides that this Court may review final judgments rendered by the highest court of a State in which a decision could be had, "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

The Appellate Department of the Los Angeles Superior Court is the "highest court of the State" for purposes of this appeal. *Smith* v. *California,* 361 U.S. 147; *Edwards* v. *California,* 314 U.S. 160.

(iv) Cases Sustaining Jurisdiction

Generally. The general jurisdiction of this Court as to this cause is upheld by the case of *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.Ed. 184, 187. The case of *Scott* v. *Donald,* 165 U.S. 58, 170 S.Ct. 265, 41 L.Ed. 632, affirms that in any case involving a state law claimed to be in contravention of the U.S. Constitution, this Court also has jurisdiction of the entire case and of all questions involved in it.

Regarding State Statutes and Procedures Thereunder Which Are Vague, Failing of Proper Standards, Lacking Adequate Notice of Crime, and Infringing Constitutional Guarantees. This Court has heretofore established that any conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. *Wright* v. *Georgia,* 373 U.S. 284, 293, and cases cited therein. See also *Connally* v. *General Construction Co.,* 269 U.S. 385, 391; *Lambert* v. *California,* 355 U.S. 225, 228. This Court has repeatedly held that vague laws in any area suffer a Constitutional infirmity, but that, particularly, where First Amendment rights are involved, and the free dissemination of ideas may be the loser, even stricter standards must be applied. *Ashton* v. *Kentucky,* 384 U.S. 195, 200; *Dombrowski* v. *Pfister,* 380 U.S. 479, 490; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432; *Smith* v. *California,* 361 U.S. 147, 151; *Winters* v. *New York,* 333 U.S. 507, 509. This Court has also consistently exercised its jurisdiction through the years to zealously guard rights involving freedom of speech, opinion, and communication, in a long line of cases. For example, see *Terminiello* v. *Chicago,* 337 U.S. 1, 4; *Thomas* v. *Collins,* 323 U.S. 516; *Near* v. *Minnesota,* 283 U.S. 697; *Louisiana* v. *N.A.A.C.P.,* 366 U.S. 293, 296; *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495; *Freedman* v. *Maryland,* 380 U.S. 51, 13 L.Ed. 2d 649, 85 S.Ct. 734; *Bridges* v. *California,* 314 U.S. 252; *Board of Education* v. *Barnette,* 319 U.S. 624, 641; *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963); *Grosjean* v. *American Press Co.,* 297 U.S. 233.

Unlawful "Search and Seizure" of Dr. Kowan's Conversations. This Court has exercised its jurisdiction on a number of occasions involving intrusion upon private rights through use of unauthorized electronic surveillance

and "eavesdropping" for purposes of gathering evidence. *Alderman* v. *United States, and related cases,* Nos. 133, October Term, 1967 and 11 and 197, October Term, 1968, decided by this Court March 10, 1969; *Berger* v. *New York,* 388 U.S. 41; and *Katz* v. *United States,* 389 U.S. 347. Defendant and appellant recognizes that the facts in the case at bar are somewhat different than those ruled upon in the aforesaid cases. Nevertheless, he cites said decisions to this Court because the rationale thereof and rights involved therein were most apropos of this cause.

Denial of Fair Trial and Due Process. The two leading decisions of this Court barring inflammatory and prejudicial conduct and statements of a prosecutor, specifying that "fair play" is the strict standard to be applied by him, are *Viereck* v. *United States,* 318 U.S. 236, 247 and 248, and *Berger* v. *United States,* 295 U.S. 78, 88. Both of said cases applied to federal prosecutions, of course. To defendant and appellant's knowledge, this Court has not yet specifically applied the decisions noted, and the requirements laid down thereunder, as being included within the purview of required "due process" under the Fourteenth Amendment to the U. S. Constitution, in State prosecutions. However, in other decisions of this Court, various actions by state prosecutors have been considered within the proscriptions of "due process". For example, see *Mooney* v. *Holohan,* (1935) 294 U.S. 103 (knowing use of perjured evidence); *Alcorta* v. *Texas* (1957) 355 U.S. 28 (allowing an important witness to give misleading evidence); *Brady* v. *Maryland,* (1963) 373 U.S. 83, 87 (suppression of evidence); and *Chapman* v. *California,* 386 U.S. 18. In the latter case this Court has not only held that admission of highly prejudicial evidence and comments by a prosecutor would be barred by "due process"

guarantees, but also that before a Federal constitutional error can be held harmless the Court must be able to declare a belief that it was harmless *beyond any reasonable doubt.* Defendant and appellant respectfully submits that the misconduct of the prosecutor in the case at bar was grossly violative of Dr. Kowan's Constitutional rights, and most certainly not "harmless".

This Court has repeatedly held that where there is no proper evidence to support a conviction, "due process" guarantees have been violated, and the jurisdiction of the Court will be exercised accordingly. See *Washington* v. *United States,* 357 U.S. 348; *Johnson* v. *Florida,* 88 S.Ct. 1713, 20 L.Ed. 2d 838, 391 U.S. 596; *Thompson* v. *Louisville,* 362 U.S. 199, 206; *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 95; and *Garner* v. *Louisiana,* 368 U.S. 157, 163. This Court has also required, as necessary to fulfill "due process" procedures, trial by an impartial jury. *Parker* v. *Gladden,* 385 U.S. 363, 364.

Defendant and Appellant states that this Court's jurisdiction herein is amply sustained by its decisions cited above.

(v) Text of Statutes Involved

Section 1714, California Health and Safety Code, as in effect at the time of Dr. Kowan's prosecution, read as follows*:

> It is a misdemeanor for any person willfully and falsely to represent a device, substance or treatment as effective to arrest or cure cancer. Nothing in this section shall abridge the existent rights of the press.

* Note: This statute has since undergone minor amendments, its substance remaining the same, however.

Section 26286, California Health and Safety Code, read as follows:

> The dissemination of any false advertisement of a drug or device is prohibited.

Included herein, as "Appendix 'C' " are the applicable provisions of the California Health and Safety Code, to wit, Sections 1704, 1709, 1711 and 1712, respectively, as in effect at the time of Dr. Kowan's prosecution, providing for notice and a full hearing, and subsequent Court review, before a physician could be precluded from recommending a specific cancer therapy.

(c) *QUESTIONS PRESENTED BY THE APPEAL*

I.

Whether or not Sections 1714 and 26286, California Health and Safety Code, and the procedures employed thereunder against Dr. Kowan, are un-Constitutional as denying defendant and appellant his rights, individually and as a physician, guaranteed by the First and Fourteenth Amendments to the U. S. Constitution.

II.

Whether or not intrusion by the State upon Dr. Kowan's private premises, and unauthorized use of electronic "eavesdropping" equipment to gather evidence against him constituted an unlawful and un-Constitutional search and seizure.

III.

Whether or not Dr. Kowan was denied a fair trial and the due process of law guaranteed to him because of the inflammatory and prejudicial statements and conduct of the prosecutor, by the complete lack of proper evidence to establish any crime, and by other and accompanying circumstances.

(d) STATEMENT OF THE CASE

Defendant and appellant Dr. Maurice H. Kowan is a duly-licensed California physician and surgeon, having for many years practiced his profession and maintained offices and hospital affiliations in Los Angeles.

On May 17, 1966, one Tobias Flores, a State-paid "informer", visited Dr. Kowan's offices. Flores was hired through the Department of Public Health to pose as a patient, and was instructed to tell defendant a false story as to his circumstances and the history of his leukemia condition. He was armed with a secret recording device, set to relay any conversations with Dr. Kowan to a State-manned receiving unit located in a car parked nearby (Rep. Tr., pages 593, 598, 607, 612, 646, 655, 705, 717). Flores also visited Dr. Kowan's offices on May 23 and May 24, 1966, and again on June 2, 1966. Dr. Kowan administered Laetrile to Flores, made some dietary recommendations, and attempted to secure the Veterans Administration Hospital records covering Flores' previous history and treatment. On direct examination, Flores stated that Dr. Kowan expressed the opinion on May 17, 1966, that he could "arrest" the leukemia or "cure" it. Dr. Kowan showed Flores a book about Laetrile, and stated that it was "controversial". This alleged expression of views was the principal basis of the State's case. Defendant and appellant respectfully submits that even assuming that these events actually took place, as Flores testified, Dr. Kowan was well within his rights to thus express his professional opinion to a supposed patient, and that to found a charge of crime on what he then allegedly stated grossly violated his Constitutional rights.

On cross-examination, however, Flores acknowledged having read and executed a written statement and release

(People's Exhibit No. 13) which he said he understood and believed to be true, that the treatment being rendered by Dr. Kowan would be "experimental in nature". Flores further affirmed and acknowledged as true (Rep. Tr., page 664):

> *"I further realize that Dr. Kowan makes no guarantee or premises towards the successful treatment of my cancerous condition."*

Flores admitted that his only interest was in a prosecution; that he was not a bona-fide patient or interested in obtaining any relief or benefit from the treatment prescribed by Dr. Kowan.

The State offered as medical witnesses, to establish "falsity" of Dr. Kowan's views, Drs. Steinfeld, Ernst and Brook, who stated their opinions that Laetrile would not be of value in the treatment of cancer. None of these "experts" had ever used Laetrile or treated any patients with it. (Rep. Tr., Pages 122, 304, 786, 800, 877, 1238, and 1538). The defense offered expert testimony concerning Laetrile, by Doctors having had actual experience with it, and who were unanimous in endorsing Laetrile as safe and effective. All witnesses for both sides agreed that Laetrile is safe for the human body. Actual favorable case histories were adduced in evidence. Reports were introduced of worldwide, scientific research performed with Laetrile, published by the International Union Against Cancer, internationally recognized as the world authority on the subject of cancer. Proceedings of the International Cancer Congress at Tokyo, in 1966, whereat the results of ten years of favorable clinical research with Laetrile were read to the Congress (see defendant's exhibit DDD), later abstracted in the proceedings of the Congress (defendant's exhibit RR), were introduced. Dr. Kowan testified that

his results with Laetrile in otherwise hopeless cases paralleled those as reported by scientists elsewhere.

Defendant and appellant submits that even viewed in the light most favorable to the State, the record herein merely reveals a conflict of medical opinion as to the value of Laetrile. Under these circumstances, Dr. Kowan could not be held to the theory of one medical opinion, to the exclusion of his own. *Baldor* v. *Rogers,* 91 Southern 2d 658, 660; *Sherman* v. *Board of Regents,* 266 NYS 2d 39, 45; *Chesney* v. *People,* 212 P. 2d 1011, 1016, 1017.

No Basis for Charge of Crime — Statutes Un-Constitutional

Did the fact that the State of California elected to "censor" Dr. Kowan for his alleged favorable opinions of Laetrile, as expressed to the State's "informer", constitute his statements a "crime"? Certainly not! And to so hold would mean no physician would dare to defy the State in rendering his opinion of a therapy, or its results. Communication between doctor and patient would be destroyed, and "fear" of prosecution would dominate the traditional and hitherto free interchange between doctor and patient. Potential harm to patients as a whole can well be imagined.

Defendant and appellant specifically notes that portion of Section 1714, California Health and Safety Code, which reads: "Nothing in this Section shall abridge the existent rights of the press." It is quite apparent that the framers of said Section had distinctly in mind the possibility that its provisions could well violate the First Amendment to the U. S. Constitution, and thus, the "press" was exempted. But, in so doing, were not the rights of doctors, such as Dr. Kowan, grossly abridged, by denial of the "equal protection of law" to which they are entitled? Is it not in-

congruous that a lay newspaper writer should be exempted from prosecution based on the same statements for which an expert physician could be jailed?

In any event, Sections 1714 and 26286 of the Health and Safety Code are un-Constitutionally vague, and provide no standard against which defendant and appellant could possibly be notified of a "crime" thereunder.

This is particularly so, as applied to the case at bar, the State having failed to follow its own administrative procedures whereby defendant and appellant should have been accorded a full hearing, followed by a "cease and desist order" in the event of an adverse ruling, followed by a court review, before his condemnation of Laetrile could have been questioned. No such order was ever issued against Dr. Kowan.

No Evidence to Support Conviction

Defendant and appellant respectfully submits that there is no valid evidence whatsoever which could support Dr. Kowan's conviction in the lower court. Therefore, pursuant to the rulings of this Court, hereinabove cited, he has been denied that due process of law guaranteed to him under the Fourteenth Amendment to the U. S. Constitution; and said conviction should be reversed.

Misconduct of the Prosecutor

Opening Statement. Even in his opening statement to the jury, the prosecutor, one Reiner, engaged in prejudicial and improper conduct. He characterized Dr. Kowan as "killing". Upon objection, he promised to prove this, but never did so. Again, over objection, he charged that defendant and appellant had "used every known quack remedy", that it was not Dr. Kowan's intent to treat his

patients, but to exploit them for financial gain. Reiner's further promises of proof were never fulfilled. (Rep. Tr., pgs. 16, 20, 21, 22)

During Trial. As the trial proceeded, Prosecutor Reiner continued to inflame the jury by prejudicial and improper conduct. During cross-examination of Dr. Frank Hamilton, who had referred the State's "informer" witness to Dr. Kowan, he questioned Hamilton (over objection) concerning an alleged "indictment" for "kick backs" inferred to involve defendant and appellant. No subsequent proof followed, nor was the subject matter proper in the first place. A motion for mistrial was denied. (Rep. Tr., pgs. 1610, 1611) Dr. Charles Gurchot, a defense scientist who endorsed Laetrile, was questioned by Reiner, over objection, concerning alleged "seizures" of Laetrile by the Canadian government, this prejudicial charge never being proved. (Rep. Tr., pgs. 1795, 1796, 1797) Dr. Navarro, a Philippine scientist and defense witness, was asked by Prosecutor Reiner whether the originator of a diagnostic test employed by Dr. Kowan had been "indicted" for mail fraud by a Texas Grand Jury. The experienced prosecutor well knew, of course, that mention of any indictment would be improper, and particularly as applied to a party not even remotedly connected with the case. (Rep. Tr., pgs. 2312, 2315)

During the trial, comparatively little time was devoted by the prosecutor to the charges, namely, what purportedly "criminal" statements Dr. Kowan had made concerning Laetrile. Rather, the jury was inundated with censures of Dr. Kowan's methods, his record-keeping, and the number of cancer patients he had treated. The Court permitted Reiner (over objection) to indulge in long "hypothetical" questions incorporating "facts" detrimental to Dr. Kowan, but not then, or ever, proved.

As Dr. Kowan took the stand, the impropriety of what had gone before increased. Prosecutor Reiner, by leading questions, implied that Dr. Kowan had been "in difficulties with the law by practicing medicine without a license". No such charge was established. (Rep. Tr., pg. 2945) By further questions, Reiner implied that the Doctor was guilty of illegality as to post-operative care of surgical patients, and that he had been guilty of "fee-splitting" with one Joseph Carney. Defendant's denials obviously failed to erase the prejudicial effect upon the jury. No subsequent proof followed. (Rep. Tr., pgs. 2961-2979) Reiner also inferred that Dr. Kowan had sent patients to a clinic "staffed by attendants who were mental patients at a mental hospital". (Rep. Tr., pg. 3001) Defendant and appellant denied it, but the prejudicial effect necessarily remained. No proof followed. Later in his interrogation Reiner purported to hold a "transcript" of a telephone conversation between "informer" witness Flores and the defendant, the substance of which would seem, from Reiner's questions, to be incriminating to Dr. Kowan. The defendant denied ever talking to Flores, but despite vehement defense objections, upon Reiner's offer to prove the conversation, he was permitted by the Court to continue the questioning. The promised proof was never forthcoming. (Rep. Tr., pgs. 3127-3139, 3134)

Closing Statement. Despite what had gone before, Prosecutor Reiner exceeded all bounds of his previous impropriety in his closing statement to the jurors. (Rep. Tr., pgs. 1893-1919) Defendant and appellant's humble beginnings as a male nurse were excoriated. Repeated reference was made to Dr. Kowan's never-proved "illegal" professional activities. He was again attacked as "using mental patients from Norwalk State Hospital". Reiner

further charged—"right from the very beginning, the very first day of his professional career, he was taking advantage of sick people", that his "only purpose of going into medicine in any form" was to "take advantage" of people who were sick, "people who are in a very weak position because they are sick". Defendant was accused of being "a man who has made a career of taking advantage of sick patients", and "the most thoroughly evil person that the imagination can imagine . . . . this man is nothing short of being a killer. He knows he is a killer. . . . He is putting people in their graves for money", a man who "can kill at $9 a visit. . . ." (Rep. Tr., pgs. 1907, 1908, 1909, 1910) Defendant and appellant's professional offices were termed "an assembly-line operation. . . . what gives this man the right to prey upon people who are so grievously ill?" Dr. Kowan was termed a "vulture who doesn't go after anybody until the person is dead . . . . this man has to be stopped. He is dangerous." (Rep. Tr. pp. 1911, 1914)

Other instances illustrating the grossly inflammatory and prejudicial nature of the prosecutor's remarks could be cited, but suffice it to say that this closing statement, in and of itself, denied defendant and appellant the fair trial and "due process" to which he was entitled. The circumstances in the case at bar are indeed far more serious than those ruled upon by this Honorable Court in the *Berger* and *Viereck* cases, cited hereinabove.

Appellate Department Ignored Misconduct of Prosecutor.

In its memorandum opinion and judgment, the Appellate Department largely ignored the misconduct of the prosecutor as "harmless". Defendant and appellant was taken to task for not specifically detailing each error and instance of misconduct which occurred during the long trial herein, the same having been referred to only by page reference

in the brief before the lower court, and review thereof therefore being declined. In this regard, the Appellate Department had itself drastically limited the length of the Brief which could be filed by Dr. Kowan, thus making it impossible for more specific citations to be set forth. In its ruling, the lower court also largely ignored the numerous citations of California authority which would constitute the misconduct of the prosecutor grossly prejudicial, and require reversal of Dr. Kowan's wrongful conviction. (*People* v. *Williams,* 104 C.A. 2d 323, 231 P. 2d 554; *People* v. *Figueredo,* 130 C.A. 2d 498, 279 P 2d 200; *People* v. *Baker,* 147 C.A. 2d 319, 305 P. 2d 97; *People* v. *Gill,* 143 C.A. 2d 46, 299 P. 2d 682; *People* v. *Solis,* 193 C.A. 2d 68; *People* v. *Vienna,* 142 C.A. 2d 172; *People* v. *Talle,* 111 C.A. 2d 650; *People* v. *Arends,* 155 C.A. 2d 496; *People* v. *Fong Sing,* 38 C.A. 353; *People* v. *Lee Chuck,* 78 C. 317.) Defendant and Appellant sincerely prays that this vital matter shall be reviewed by this Court, to remedy the grave injustice and denial of fair trial caused by Prosecutor Reiner's misconduct.

Accompanying Circumstances Aided Denial of Fair Trial.

Defendant and Appellant continuously and strenuously objected to the injection of prejudicial, irrelevant, and improper matter at the trial of this cause. Numerous erroneous rulings of the trial Judge permitted such matter to be placed before the jury, nevertheless. Thus, the situation bringing about the denial of the fair trial to Dr. Kowan was compounded by these accompanying circumstances. One flagrantly erroneous and improper ruling of the trial court, in and of itself aiding to deny defendant and appellant a fair trial, occurred during deliberations of the jury, when the jury foreman requested that the testimony of the State's "informer" witness be related concerning what Dr. Kowan

stated concerning any "cure". The court thereupon, on its own initiative, ordered only the direct testimony of Flores to be read to the jury, omitting, over objection, reading of the cross-examination revealing that Flores had affirmed no "cure" had, in fact, been promised by Dr. Kowan. Thus, at this crucial point at the end of a lengthy trial, the misleading nature of Flores' direct testimony was emphasized to the jury, while the offsetting and explanatory circumstances adduced on cross-examination were omitted, a most prejudicial circumstance. See *People* v. *Henderson*, 4 C. 2d. 138.

How the Federal Questions Were Presented.

Before trial. Defendant and appellant filed a written "Demurrer to the Amended Complaint", wherein it was alleged among other things, that the First, Sixth and Fourteenth Amendments to the Constitution would be a bar to the prosecution, that the defendant would be denied due process of law, pursuant to the Fourteenth Amendment of the United States Constitution, by virtue of vagueness of the charges, that the Court would be without jurisdiction to proceed in that defendant's Constitutional rights of due process of law would be violated, that the facts stated did not constitute a public offense, and that failure to comply with the procedures set forth in Health and Safety Code, Section 1720 would void the case. Said Demurrer was amplified upon in oral argument, the Court denying it on May 31, 1967. On May 31, 1967, the trial Judge also overruled and denied defendant's motion to dismiss for lack of jurisdiction, wherein were also cited Federal Constitutional objections.

During trial. On numerous occasions during the trial, defendant and appellant raised Federal grounds as herein

involved. Regarding "eavesdropping" employed against defendant, objection was made to illegal use of evidence based thereon. (Rep. Tr., 3128, 3129, 3137) As to the propriety of the statutes involved herein and the "due process" of various procedures, and the matter of "notice of wrongdoing" by virtue of State procedures followed against defendant, objections also appear in the record herein, as made during the trial. (Rep. Tr., 266, 729, 730, 737, 3072, 3073) Defendant also objected to testimony of so-called "experts" to purportedly support the charges herein. (Rep. Tr., 120, 131, 148, 1082, 1238, 1255, 1270, 852, 860, etc.) Concerning misconduct of the prosecutor, numerous objections were interposed during the trial; motions for mistrial were also made. (Rep. Tr., 738, 1611, 2313, 2971). All of the objections and motions were denied by the trial Judge. At the close of the prosecution's case, defendant and appellant moved to dismiss, which motion was argued and denied by the Court, with the comment that the prosecution case was "not the strongest in the World". (Rep. Tr., 1565 through 1589) Specific matters pertaining to the Constitutional grounds involved herein may be noted at pages 1565, 1566, 1571, 1572, 1574, 1576, 1577, 1578, 1582, 1588 and 1589 of the Reporter's Transcript. At the conclusion of the trial, defendant filed a written motion to advise the jury to acquit for insufficient evidence, which was denied by the Court. On June 27, 1967, a motion was made on behalf of defendant and appellant to dismiss on the ground that the prosecution had not established a corpus delicti, or a prima facie case. The motion was denied. At the conclusion of the trial, a written motion to dismiss, thereafter argued and amplified upon, was filed, on the basis that the entire proceeding herein was in violation of due process of law as guaranteed by Amendments One, Two, Four, Five, Six and Fourteen of

the United States Constitution, among other things. Said motion was denied. On September 6, 1967, a notice of motion for new trial was filed, thereafter being denied. On September 26, 1967, a proposed statement on appeal was filed by defendant, specifying, among other things, that Dr. Kowan's rights under the Fifth and Fourteenth Amendments of the U. S. Constitution, and his rights under the First, Fourth and Sixth Amendments, had been denied, the misconduct of the prosecutor was cited, the lack of a chargeable offense was set forth, and cited. It was also alleged therein that the Constitutional rights of Dr. Kowan, under the U. S. Constitution, had been denied and he had been deprived of the freedom of life, liberty, and pursuit of happiness thereunder guaranteed to him. Said notice also cited the illegal obtaining of evidence against defendant in contravention of the Fourth, Fifth and Fourteenth Amendments of the U. S. Constitution, and it was set forth that the "fruits" of illegal evidence obtained by illegal transcriptions had been wrongfully permitted in evidence. Thereafter, on October 18, 1967, a statement on appeal setting forth substantially the same grounds was filed by defendant.

Appellate Department—Appellant's opening brief, filed with the Appellate Department of the Superior Court, specifically enumerated various Constitutional grounds hereinaboye mentioned, including misconduct of the prosecutor, un-Constitutionality of proceedings against defendant under the statute noted, the illegality of using electronic "eavesdropping" equipment to gather evidence against defendant, the deprivation of "due process of law" inherent in the lower court proceedings, including denial of fair trial, denial of defendant's freedom as a physician, the insufficiency of the evidence, the lack of jurisdiction for the lower court to proceed. The reply brief thereafter filed

contained further references to federal questions, certain citations being added, such as a reference to this Court's decision in *Chapman* v. *California,* 386 U.S. 18. Subsequent to the memorandum opinion and judgment of the lower court, defendant and appellant filed a petition for re-hearing (which was denied), containing, among other things, the following:

> "Appellant takes particular note of the fact that this court has, in effect, ignored the grave Constitutional issues raised by Appellant in his appeal. He, therefore, respectfully prays that this Court shall rehear this matter, if only to give proper consideration to such issues."

Thereafter, notice of appeal to this Court was filed in the Appellate Department of the Superior Court. Defendant and Appellant also filed a declaration wherein various decisions of this Court were cited, reference was made to the questions herein as to the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments, the misconduct of the prosecutor was cited, as well as the matter of "unreasonable search and seizure".

(e) FEDERAL QUESTIONS ARE SUBSTANTIAL

Defendant stands convicted before this Court because of the passion and prejudice of a jury inflamed by misconduct of the prosecutor herein at a trial wherein no valid evidence whatsoever was adduced to support his conviction. Dr. Kowan was charged with "crime" in the first place solely and only *for what he said,* and for daring to express his professional opinions and views, thus displeasing the State. The State's "informer" witness, armed secretly with electronic "eavesdropping" equipment, to gather evidence with which the Doctor could be prosecuted, had entered upon the Doctor's private premises, surreptitiously recording his conversations.

Defendant and appellant submits that the Federal questions herein are both individually, and collectively, most substantial, and that he has been grossly deprived of rights guaranteed to him under and pursuant to the U. S. Constitution. He urges the Court, also, that this case involves more than just the rights of one doctor, and that, indeed, if defendant and appellant may be prosecuted under the circumstances in the case at bar, indeed no physician and surgeon would be safe from State intrusion upon his Constitutional rights.

Review by this Court and reversal of defendant and appellant's unjust conviction will go far to reaffirm the Constitutional rights which have been so trampled upon at the cause at bar, and which preserve the freedoms under which all of us live.

CONCLUSION

Permitting a state-dictated monopoly of medical thought and speech is as dangerous in the healing arts as it is in economics or in political thought—perhaps more so, for here we are dealing with life itself. In the case at bar, the State of California, displeased with Dr. Kowan's use of Laetrile, would assume this role. Unfortunately man can be jealous of the known and reluctant to even consider what is new or different. History has shown that men of medicine can be as narrow and uncompromising as other men. History has shown that many discoveries that we now consider significant were rejected by the majority and their discoverers hounded. History contains many examples to prove this point. Joseph Lister was nearly driven out of the medical profession by the British Medical Association because he said that surgery which was not antiseptic gave rise to infections and caused great mortality

among the patients. Pasteur was hounded by the doctors and physiologists of France, for his scientific innovations. Semmelweis—and in our country, Oliver Wendell Holmes, Sr.—who discovered the cause of puerperal fever, resulting in death of women in childbirth, caused by the dirty hands of doctors—were nearly driven from the profession. Semmelweis died, driven and hounded to his death. Alexander Fleming, discoverer of penicillin, was branded a "quack" by his colleagues as his discovery lay on the shelf for twelve years before being acknowledged as a great advance in science. Many others could be named.

The instant case is important in this struggle against monopoly in the healing arts. Here, as the defendant and appellant points out, Dr. Kowan has in reality been convicted of speaking concerning a healing practice in which he believes. He was accused of a crime, but at trial his action was not measured against the standards of any valid statutes involved, but against a State critical of the healing art which he followed. Thus, the State of California became an instrument for oppression. It has placed itself in the position of stamping out those who dare to disagree, and to follow the judgment and discretion delegated to them in the first place as medical doctors. As it today hounds Dr. Kowan, the State would yesterday perhaps have hounded a Lister, a Pasteur, a Jenner, a Koch, an Oliver Wendell Holmes, Sr. And the day before it might have accused and convicted those who dared refuse to bleed during illness or use leeches. From this, progress does not come. From this, man in control may be more comfortable and secure in his comparative ignorance, but he does not learn.

A recent statement by Dr. Norman Welch, past-President of the American Medical Association, is most pertinent to this cause:

> "It must be remembered that the miracle that is medicine today has been possible only because the physicians of our country have been permitted to practice their art and their science in an atmosphere of freedom, to seek and to give us their findings—unfettered by the bonds of a dictatorial, politically-motivated few. Good medicine, like democratic action in a free nation, has flourished, is faithfully practiced, and will continue to flourish so long as the air of freedom is present. This is what made America great, and this is what made American medicine great."

In this context, the instant case is of great significance to all Americans. Because of this significance, it is respectfully urged that this Court shall reverse the judgment below.

Respectfully submitted,

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APPENDIX "A"

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 7658 — Trial Court No. 270459

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
MAURICE H. KOWAN,
Defendant and Appellant.

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court of the Los Angeles Judicial District, James Harvey Brown, Judge.

Counts 3, 6, 9, 10, 11, and 12 of the judgment are reversed.

Counts 1, 2, 4, 5, 7, and 8 of the judgment are affirmed.

For Appellant—Gladys Towles Root, Esq.

For Respondent—Roger Arnebergh, City Attorney
Philip E. Grey, Assistant City Attorney
Michael T. Sauer, Deputy City Attorney

The appellant, a medical doctor, was charged with four counts of violation of Penal Code Section 484 (petty theft) four counts of violation of Health and Safety Code Section

26286 (falsely advertising a drug), and four counts of violation of Health and Safety Code Section 1714 (falsely representing a drug). After trial by jury, the appellant was convicted of all twelve counts. He appeals from the judgment of conviction.

FACTS

The twelve counts related to medical treatments given on May 17, May 23, May 24, and June 2 in 1966 by the appellant to Tobias P. Flores. Mr. Flores, who had been suffering from chronic granulocytic leukemia[1] and had been under treatment at the Veterans' Administration Hospital, volunteered to serve as an undercover agent for the Department of Public Health.

On May 17, 1966, Mr. Flores went to appellant's office and told appellant that he had been diagnosed as having leukemia, that the doctors at Veterans' Administration Hospital in Long Beach had prescribed a little white pill, but that he had not received X-ray or Cobalt treatment. Mr. Flores was accompanied by Mrs. Virginia Vicars, also an undercover agent for the Department of Public Health. The appellant, without ascertaining the nature of the white pills, nor inquiring with respect to the type of leukemia which had been diagnosed, nor giving Mr. Flores a physical examination, proceeded to prescribe a course of treatment. Appellant said that he would like to commence Laetrile treatment as soon as possible, beginning with daily injections, followed the second week with injections every other day, and continuing "until the disease had been arrested." Appellant also discussed with Mr. Flores the advisability of taking food supplements and vitamins and of preparing

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[1] Leukemia is the abnormal, uncontrolled, overgrowth of the white cells, and is a type of cancer.

his food in an osterizer, which the appellant could sell him at a discount.

On May 23, 1966, Mr. Flores returned to the appellant's office, received an injection of Laetrile, and paid $30. Before receiving this injection, the appellant had Mr. Flores sign a release which provided in part that the patient realized "that such treatment and surgery is experimental in nature and offer[s] no definite promise of cure or relief." The "release" further provided that Dr. Kowan makes no guarantees or promises towards the successful treatment of [his] cancerous condition." The document concluded that "Dr. Kowan and/or assistants, associates and consultants" were released of any legal liability.

On this occasion the appellant stated to Mr. Flores that the Laetrile would kill the white cells in the blood stream and in the marrow, and that one of the other medications prescribed would remove them from the body. The appellant further stated that with the Laetrile injections and other medication Mr. Flores' leukemia condition would be cleared up within a year.

On May 24, 1966, Mr. Flores received another injection of Laetrile, paid $9, and was told again that it would kill the white blood cells.

On June 2, 1966, he received the third injection from the appellant and also purchased two vials of Laetrile on the pretense that it would be difficult to return because of illness in the family. Mr. Flores paid the appellant $21 on this visit.

EFFECTIVENESS OF LAETRILE

In order to establish that the above described acts of the appellant constituted falsely advertising a drug, falsely representing a drug, or obtaining money by false pre-

tenses (petty theft), it was incumbent upon the prosecution to prove that Laetrile is worthless in the treatment of cancer. The evidence on this basic issue was voluminous and conflicting.

On appeal, the appellant has attacked the sufficiency of the evidence offered by the prosecution on this basic issue and has laid great emphasis upon the evidence most favorable to his position. In so doing, he has failed to recognize the limitation of appellate review.

> "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." *Crawford* v. *Southern Pacific Co.* [1935] 3 Cal. 2d 427, 429. (See also, *People* v. *Newland* [1940] 15 Cal. 2d 678, 681.)

We find it neither necessary nor helpful to the determination of this appeal to summarize the opinions of the many experts who testified in this case nor to discuss the numerous reasons given in support of these opinions. It is sufficient to note that there was substantial evidence to support a determination that Laetrile has neither curative nor palliative value in the treatment of patients with cancer.

One of the expert witnesses testified that the use of worthless drugs is dangerous because it prevented a patient from seeking proper treatment. Three medical experts[2] called by the prosecution were of the unanimous opinion that Laetrile is worthless.

PETTY THEFT

With respect to the four counts for petty theft, however, we are of the opinion that the evidence as a matter of law is insufficient to sustain the convictions.

One of the necessary elements of the crime of obtaining money by false pretenses is reliance on the false representation by the victim. (See 1 Witken, *California Crimes*, pp. 372 and 384. In the present case, the undisputed evidence disclosed that Mr. Flores was an undercover agent for the Department of Public Health and that the payment of money to the appellant was not in reliance of his representations with respect to Laetrile. While it has been held that a conviction for *attempted* theft by false pretenses can be sustained even where the victim did not rely on the

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[2] The three medical experts were: 1) Dr. Jesse Steinfeld, M.D., specialist in Oncology (study of tumors) and full professor at USC Medical School, has taught at University of California and George Washington University. He is Cancer Coordinator and Project Director of Cancer Hospitals and Research at USC and consultant to the National Cancer Institute; Associate Editor of both **Cancer Research** and **Journal of the National Cancer Institute**. 2) Nathan Friedman, M.D., specialist in pathology, has taught at both Stanford and George Washington Universities. He is now a professor at USC, and Director of Laboratories at Cedars of Lebanon Hospital. 3) Kenneth Ernst, M.D., specialist in Pathology, is from University of Minnesota and Walter Reed Hospital where he served as Chief of Pathology before he was head of the Cancer Diagnosis and Therapy Evaluation Unit of the Public Health Department.

representations of the accused (*People* v. *Ryan* [1951] 103 Cal. App. 2d 904; *People* v. *Camodeca* [1959] 52 Cal. 2d 142, 146), the completed crime of theft by false pretenses requires that the victim be induced to part with property in reliance on the representations. (See *People* v. *Alba* [1941] 46 Cal. App. 2d 859, 867.) Inasmuch as the appellant was convicted of *theft*, rather than *attempted theft*, the convictions based upon counts 3, 6, 9, and 12 must be reversed.

FALSE REPRESENTATION AND ADVERTISEMENT

The appellant was also convicted of four counts of false representation of a substance or treatment as effective to arrest or cure cancer in violation of Section 1714 of the Health and Safety Code, and four counts of false advertisement of a drug in violation of Section 26286 of the Health and Safety Code. It has been held that the term "advertisement" includes oral representation. (*People* v. *Schmitt* [1957] 155 Cal. App. 2d 87, 102; *People* v. *Galway* [1953] 120 Cal. App. 2d 45, 49.)

We are of the opinion that the statements made by the appellant to Mr. Flores regarding the effectiveness of Laetrile as a cancer remedy constituted sufficient evidence to sustain the convictions for false advertising and false representations. These statements were made on May 17, May 23, and May 24. It is to be noted that while the appellant on June 2nd administered an injection of Laetrile and sold two vials of Laetrile to Mr. Flores, he made no representations on that date.

The prosecution seeks to bridge this hiatus in the evidence by urging that the statements made by the appellant on the earlier dates constituted a continuing offense, and that on the latter date the appellant was impliedly promis-

ing to arrest or cure cancer. While it is true that in a prosecution for theft by false pretenses the false representations are treated as continuing so as to cover any property subsequently received as a result of the false representation, this legal theory is provided for by statute (Penal Code 484). Moreover, it should be remembered that the gist of the crime of theft is the taking of property, while the gist of the crime of false representation and false advertising is the uttering of the false statements.

On June 2nd the appellant made no statements with respect to the effectiveness of Laetrile and none can be implied. In administering and selling Laetrile on that date, the appellant may have been guilty of other crimes, but he was not guilty of false representation or false advertising. It is our opinion that there was no substantial evidence to support the convictions based upon Counts 10 and 11.

THE "RELEASE"

The appellant appears to put great stress upon the fact that the appellant obtained the signature of Mr. Flores upon a "release" which in part provided that "Dr. Kowan makes no guarantees or promises towards the successful treatment of my cancerous condition." This "release" and the circumstances surrounding its execution constituted evidence to be considered by the jury along with other evidence on the issue of whether or not the appellant in fact made false representations. It was the province of the jury to determine the effect and value of the evidence addressed to it (Ev. Code 312), and apparently the jury found that the evidence of the "release" was less convincing than other evidence produced at the trial. There was ample evidence to support such a determination.

SUFFICIENCY OF COMPLAINT

Appellant contends that he was denied due process of law because the amended complaint was vague and uncertain and did not apprise the appellant of the nature of the charges. He further contends that the trial court erred in overruling his timely demurrer.

While it is true that the allegations of the amended complaint were pleaded in the language of the statutes in question, it is settled that an accusatory pleading is sufficient if it is stated in the terms of the statute describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense with which he is charged. (Pen. Code §952; *People* v. *Docherty* [1960] 178 Cal. App. 2d 33, 39; *Ratner* v. *Municipal Court* [1967] 256 A.C.A. 1036, 1040.)

Each count stated the date of the alleged violation and each count alleging theft stated the name of the victim and the value of the property taken. Moreover, the counts alleging false advertisement of a drug specifically mentioned "beta-cyanogenetic glucosides including amygdalin (with or without the addition of diisoproplyl ammonium iodide), and prunasin, commonly known as 'Laetriles'."

The amended complaint was sufficient to apprise the appellant of the nature of the charges, and the court did not err in overruling the demurrer.

JURISDICTION OF COURT

Appellant contends that the municipal court was without jurisdiction to determine violations of Section 1714 (false representation of substance or treatment to arrest or cure cancer) which appears in Chapter 7, Division 2 of the Health and Safety Code. It is his position that Chapter

7 provides for administrative hearings and that Section 1720 thereof provides that all hearings authorized by this chapter shall be conducted in accordance with the procedures set forth for administrative adjudication in the Government Code. (Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code.) Appellant also argues that the administrative procedure is a condition precedent to criminal prosecution and that the administrative remedy has not been exhausted. This is not a proper application of the rule requiring exhaustion of administrative remedies, since this is not a review of such a proceeding. (See 2 Cal. Jur. 2d, Administrative Law, §184, p. 304.) We have examined the sections of the Health and Safety Code and find nothing whatsoever making either remedy a condition precedent to the other remedy.

While it is true that the Legislature did provide for investigation, testing, hearings, and cease and desist orders by the Cancer Advisory Council, the Legislature did not intend that these prescribed activities be the exclusive means of protecting the public. By Section 1712, the Department of Public Health is authorized to seek an injunction in the Superior Court, and by Section 1716 its director is required to make investigations and to report violations to the appropriate enforcement authority. Section 1717 requires county health officers, district attorneys, and the Attorney General to cooperate with the director in the enforcement of Chapter 7, Division 2 of the Health and Safety Code.

Moreover, Section 1714 provides that it is a misdemeanor for any person willfully and falsely to represent a device, substance, or treatment as effective to arrest or cure cancer, and Section 1715 provides that a third violation and subsequent violations of the chapter are felonies.

It is apparent that the Legislature intended to authorize enforcement officers to utilize administrative hearings, injunction proceedings, and criminal prosecutions. Jurisdiction to determine criminal cases amounting to misdemeanors is vested in the municipal court (Penal Code 1462), and the charges against the appellant for violation of Section 1714 of the Health and Safety Code were properly commenced in the municipal court.

THE "MIRANDA" ISSUE

Appellant contends that the testimony of Tobias Flores and Virginia Vicars, the undercover agents, regarding statements made by the appellant was improperly admitted into evidence. He bases his contention upon the fact that the undercover agents failed to advise him of his constitutional rights as required by the case of *Miranda* v. *Arizona* [1966] 384 U.S. 436, and upon the fact that Virginia Vicars had in her possession a tape recorder when she accompanied Mr. Flores to the appellant's office.

It should be noted that the testimony of both Mr. Flores and Mrs. Vicars related only to statements of the appellant made in his office during the various treatments rendered to Mr. Flores by the appellant. The said statements were made at a time when the appellant was not in custody and hence did not constitute "custodial interrogation" (*People* v. *Arnold* [1967] 66 Cal. 2d 438, 448), and the undercover agents were not required to give a *Miranda* type warning to the appellant. (See *People* v. *Putty* [1967] 251 Cal. App. 2d 991, 997.)

SEARCH AND SEIZURE ISSUE

In support of his position that the testimony of the undercover agents was the fruit of an illegal search and seizure, the appellant cites *Katz* v. *United States* [1967] 389 U.S. 347 and *United States* v. *White* [1968] 36 Law Week 2613.

In the *Katz* case, the Supreme Court reversed a conviction obtained after a trial during which the government had introduced the defendant's telephone conversation overheard by federal agents through a device they had attached to the outside of a public telephone booth. In the absence of a proper warrant or judicial order, surveillance was held to be "per se unreasonable under the fourth amendment" even though the F.B.I. investigation activities established "a strong probability" that the defendant was violating federal law.

In the *White* case, the defendant was convicted of possession and sale of narcotics largely as a result of the testimony of federal narcotics agents that they heard defendant make self-incriminating statements, which had been transmitted over the air by an electronic device hidden under the clothes of an informer. The informer did not testify at the trial. The United States Court of Appeals for the Seventh Circuit reversed the conviction because the evidence had been secured in violation of the Fourth Amendment in accordance with the *Katz* case.

In both the *Katz* case and the *White* case, the federal agents secured the incriminating evidence through the use of electronic devices which enabled them to overhear the conversation. In the present case, however, the undercover agents testified with respect to statements made by the appellant in their presence and intended for their ears. The recording device was not used in any way to secure the statements. It is our opinion that the doctrine of the *Katz* case is inapplicable to the present case and that there was no error in receiving the testimony of Tobias Flores and Virginia Vicars.

JURY DELIBERATION

The appellant next contends that the court erred in refusing his request to read certain testimony to the jury. The facts show that after retiring for deliberation, the jury returned to the courtroom and requested certain portions of the direct testimony of Mr. Flores be read. When asked which portion of Mr. Flores' direct examination was desired, the foreman stated that the jury would like to have read the testimony pertaining to the conversation between the appellant and Mr. Flores on the first visit regarding the "cure." Following the reading of the requested testimony, the court inquired whether there was anything else that the jury would care to have read, to which the foreman replied there was not. After the jury returned to the jury room, counsel for appellant requested that the cross-examination of Mr. Flores on the same subject matter be also read to the jury followed by a credibility instruction. This request was properly denied.

A trial judge does not have to order read any part of the testimony not requested by the jury foreman (*People* v. *Gordon* [1963] 222 Cal. App. 2d 687, 689). As was said in *People* v. *Smith* [1906] 3 Cal. App. 62, 68, and quoted in *People* v. *Cathey* [1960] 186 Cal. App. 2d 217, 222, "If a jury did not wish to hear it read the court was not required to compel them to listen to it. It may be assumed that the portion of his testimony which they heard included all upon which they desired to have their memory refreshed."

FAIR TRIAL

Finally, the appellant contends that he was denied a fair trial by the misconduct of the prosecutor and by errors in rulings by the court. In addition to grounds we have heretofore discussed, appellant has made specific references

to a few other grounds and has listed 57 references to pages in the reporter's transcript at which the prosecutor allegedly was guilty of misconduct and 65 other references to pages at which the trial court allegedly made erroneous rulings. With respect to the 122 page references, the appellant has not indicated the nature of the claimed error nor the manner in which it could have prejudiced the appellant in any substantial way.

The duty of counsel in preparing an appelllate brief has been stated as follows:

> "The points made in a brief must be supported by argument or citation of authority or they will not be considered by the reviewing court, but will be deemed without foundation, without prejudice to the appellant's rights, or to have been waived or abandoned. The appellate court cannot be expected to prosecute an independent inquiry to find reasons for or against the rulings of the trial court, and it is the duty of counsel by argument and the citation of authority to show why rulings complained of are erroneous. It is not sufficient merely to state the error without showing of what it consists." (4 Cal. Jur. 2d §484, pp. 318-320.)

An examination of the 3250 page reporter's transcript discloses that of the claimed errors appearing on the 122 pages generally enumerated by the appellant, the court sustained the appellant's objection on at least 30 occasions. With respect to the court's rulings that were adverse to the appellant, most of the court's rulings were correct, some questionable, and a few erroneous. Upon examination of all the evidence, however, we are of the opinion that the errors did not result in a miscarriage of justice (See Cal. Const., art. VI, § 13; *People* v. *Atchley* [1959] 53 Cal. 2d 160, 177.)

With respect to the numerous claimed instances of misconduct of counsel, the transcript discloses that the court properly admonished the jury on many occasions, and it must be assumed that the jury heeded the admonition. (*People* v. *Seiterle* [1963] 59 Cal. 2d 703, 711; *People* v. *Ney* [1965] 238 Cal. App. 2d 785, 801.) On other occasions, the appellant objected to the comments of the prosecutor, but failed to ask for an admonition. Since he did not ask for an admonition of the jury, he cannot now complain of its absence. (*People* v. *Campbell* [1965] 232 Cal. App. 2d 712, 715.)

Moreover, the court instructed the jury that it was to be "governed solely by the evidence introduced in the trial" and not to consider as evidence statements of counsel. It must be presumed that the jury meticulously followed the instructions given. (*People* v. *McNear* [1961] 190 Cal. App. 2d 541, 547.)

It does not appear that any of the claimed errors of the court or any of the claimed instances of misconduct of the prosecutor pertained to any violations of federal constitutional rights, and hence the doctrine of *Chapman* v. *California* [1967] 386 U.S. 18, is inapplicable. Even applying the *Chapman* test, however, we find that the claimed errors were harmless beyond a reasonable doubt.

CHARACTERIZATION OF LAETRILE

Deserving of additional discussion is the appellant's charge that the prosecuting attorney committed prejudicial error in his characterization of Laetrile as an "illegal drug" and as a "quack remedy." In characterizing Laetrile as an "illegal drug" in his opening statement, the prosecutor may have been overstating his case, but in the absence of an affirmative showing of bad faith, the discrepancy be-

tween statement and proof is not reversible error (See *People* v. *Berryman* [1936] 6 Cal. 2d 331, 336). There was no showing of bad faith in this case.

In any event, the court clearly delineated the issue by the following instruction: "You are hereby instructed that the evidence in this case has shown that Laetrile is Amygdalin, a commercially available drug. Possession of Laetrile is not in and of itself illegal. The issue in this case, as to Laetrile, is whether or not it is effective in the treatment of cancer."

Thus the crucial issue in this case was not the legality of Laetrile, but its effectiveness in the treatment of cancer. The evidence was not only substantial, but overwhelming, that Laetrile was ineffective in the treatment of cancer. The characterization by the prosecuting attorney that Laetrile was a "quack remedy" in connection with the treatment of cancer was not prejudicial error.

CONCLUSION

The convictions on Counts 3, 6, 9, and 12, pertaining to theft, are reversed on the ground that the evidence would support at most charges of *attempted theft,* but not *theft.* The convictions on Counts 10 and 11 are reversed, on the ground that there was no evidence that the appellant made any false representations on June 2, 1966. The convictions on the remaining six counts are affirmed.

Dated November 18, 1968

Wong
Judge
We concur:
Judge
Smith
Judge
Vasey

APPENDIX "B"

People v. *Maurice H. Kowan* No. 270459

September 15, 1967

As to Counts 1, 4, 7 and 10, the violations of Health and Safety Code Section 1714, the sentence as to each count is as follows: 180 days in the Los Angeles County Jail. It is further ordered, that the execution of the sentence be suspended and the defendant be placed on summary probation for 3 years subject to the following terms:

1. That the defendant serve 30 days in the County Jail, the sentences on all 4 counts to run concurrently.

2. That defendant pay a fine of $500 plus penalty assessment on each of the 4 counts forthwith or serve 20 days in the County Jail, jail terms to run consecutively.

3. That the defendant commit no violations of Health and Safety Code Sections 1714 and 26286 during the term of probation.

As to Counts 2, 5, 8, and 11, the violation of Health and Safety Code Section 26286, the sentence as to each count is as follows: 180 days in the Los Angeles County Jail. It is further ordered, that the execution of the sentence be suspended and the defendant be placed on summary probation for 3 years subject to the following terms:

1. That the defendant serve 30 days in the County Jail, the sentences on all 4 counts to run concurrently.

2. That the defendant pay a fine of $500 plus penalty assessment on each of the 4 counts forthwith or serve 20 days in the County Jail, jail terms to run consecutively.

3. That the defendant commit no violations of Health and Safety Code Sections 1714 and 26286 during the term of probation.

As to Counts 3, 6, 9 and 12, the violations of Penal Code Section 484, the sentence as to each count is as follows:

1. $100 or five days in the County Jail.

It is further ordered that execution of sentence on Counts 2, 3, 5, 6, 8, 9, 11 and 12 be stayed pending appeal and service of sentence on Counts 1, 4, 7 and 10, such stay to become permanent upon completion of sentence on Counts 1, 4, 7 and 10.

APPENDIX "C"

The applicable provisions of the California Health and Safety Code, as in effect at the time of Dr. Kowan's prosecution, as pertaining to entry of "cease and desist" orders, provided as follows:

Section 1704 Powers and duties of department of public health.

The department shall:

(d) Hold hearings in respect of those matters involving compliance with the provisions of this chapter and subpoena witnesses and documents. Any or all such hearings may be held before the Cancer Advisory Council. Any administrative action to be taken by the department as a result of such hearings shall be taken only after receipt of the recommendations of the council. *Prior to issuance of a cease and desist order under Section 1711, a hearing shall be held.* (Emphasis added.)

Section 1709—Failure to comply with chapter as misdemeanor; applicability to faith healing.

The failure of any individual person, firm, association, or other entity representing himself, or itself, as engaged in the diagnosis, treatment, alleviation, or cure of cancer to comply with any of the provisions of this chapter, or with any order of the department validly issued under this chapter, is a misdemeanor.

The provisions of this chapter shall not apply to any person who depends exclusively upon prayer for healing in accordance with the teachings of a bona fide religious sect, denomination, or organization, nor practitioneer thereof. (Added Stats. 1959, c. 789, p. 2801, #2.)

Section 1711. Cease and desist orders; investigation and testing: findings

Following an investigation or testing of the content or composition or any drug, medicine, compound, or device used by any individual, person, firm, association, or other entity in the diagnosis, treatment, alleviation, or cure of cancer, and after hearing as provided in Section 1704, the department, upon recommendation of the Cancer Advisory Council, may direct that any such individual, person, firm, association, or other entity shall cease and desist any further prescribing, *recommending,* or use of any such drug, medicine, compound, or device, or any substantially similar drug, medicine, compound, or device, in the diagnosis or treatment of cancer.

. . . . . .

Prior to the issuance of a cease and desist order under this section, the Cancer Advisory Council, by the affirmative vote of at least 11 of its members, at least one of whom shall not be a physician and surgeon, shall make a written finding of fact based on such investigation that the drug, medicine, compound, or device so investigated has been found to be either definitely harmful or of no value in the diagnosis, treatment, alleviation, or cure of cancer and the department must be satisfied beyond a reasonable doubt that the written *findings* of the fact are true. (Emphasis supplied)

Section 1712. Injunction or other restraining order.

If an individual, person, firm, association, or other entity, after service upon him or it, of a cease and desist order issued by the department under Section 1711, persists in prescribing, recommending, or using the drug, medicine, compound, or device described in said cease and desist order, or a substantially similar drug, medicine, compound, or device, the superior court in any county, on application of the department,

and when satisfied by a preponderance of the evidence that the written findings of fact required of the Cancer Advisory Council by Section 1711 are true, may issue an order to show cause why there should not be issued an injunction or other appropriate order restraining such individual, person, firm, association, or other entity from prescribing, recommending, or using such drug, medicine, compound, or device, or any substantially similar drug, medicine, compound, or device. After a hearing on such order to show cause, an injunction or other appropriate restraining order may be issued.

Proceedings under this section shall be governed by Chapter 3 (commencing at Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, excepting that no undertaking shall be required in any action commenced by the department under this section. (Added Stats. 1959, c. 789, p. 2802, #2.)

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IN THE

Supreme Court of the United States

October Term, 1968
No. 1268

MAURICE H. KOWAN, *Appellant,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 1268

MAURICE H. KOWAN, *Appellant,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered November 18, 1968, be affirmed and/or that the appeal taken therefrom to this Court be dismissed on the ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a judgment entered November 18, 1968 by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified twelve count misdemeanor complaint, filed in the Municipal Court of the Los Angeles Judicial District.

The appellant was charged with four counts of violating California Health and Safety Code Section 1714 in that on May 17, 1966, May 23, 1966, May 24, 1966 and on June 2, 1966, he "did wilfully and unlawfully and falsely represent a substance and treatment as effective to arrest and cure cancer."

The appellant was charged with four counts of violating California Health and Safety Code Section 26286 in that on May 17, 1966, May 23, 1966, May 24, 1966, and on June 2, 1966, he "did wilfully and unlawfully disseminate a false advertisement of a drug, to wit: Beta-cyanogenetic glucosides including amygdalin (with or without the addition of diisopropyl ammonium iodide) and prunasin, commonly known as Laetriles."

The appellant was charged with four counts of violating California Penal Code Section 484 in that on May 17, 1966, May 23, 1966, May 24, 1966, and on June 2, 1966, he "did wilfully and unlawfully take away personal property of another, of a value not exceeding the sum of two hundred dollars, to wit: The personal property of Tobias Flores of the approximate value of" certain specified amounts.

On July 24, 1967, the appellant was adjudged guilty on all twelve counts by a jury. On September 15, 1967 sentence was imposed by the court.

An appeal was taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in

said appellate court and oral argument presented. The matters were submitted and thereafter on November 18, 1968 the judgment was affirmed in part and reversed in part in a written unpublished opinion (Jurisdictional Statement, Appendix "A"). A petition for Rehearing or Certification to the Court of Appeal was denied on December 5, 1968. Appellee's request for Modification of Opinion was denied on December 5, 1968.

On February 18, 1969 the appellant filed a Notice of Appeal to the United States Supreme Court in the Appellate Department of the Los Angeles Superior Court.[1]

I.

California Health and Safety Code Sections 1714 and 26286 Are Not a Violation of the First and Fourteenth Amendments.

The California Department of Public Health has determined that Laetrile is of no value in the diagnosis, treatment, alleviation or cure of cancer. . . . . The Department recommended that the public refrain from using Laetrile (Title 17, Chap. 5, Sub-Chap. 2, Article 2, Section 10400.1(b). California Administrative Code).

In Section 10400.1(c) the administration, sale or other distribution of Laetrile to any patient who has or believes that he has or may have cancer is prohibited.

Section 10400.1(d) provides that no person shall for the purpose of prescribing, administering, selling or otherwise distributing Laetrile make any representations

[1]This was the judgment of the highest court of the State in this proceeding since certification to the Court of Appeal was denied. (*Schmerber v. California* (1966) 384 U.S. 757, 16 L. Ed. 2d 908.)

that Laetrile has any value in arresting, alleviating or curing cancer. . . .

Metastasis is the medical term for cancer spreading through the body [R. T. p. 72]. The three primary treatments for cancer is by surgery, radiation and chemotherapy [R. T. p. 76]. A doctor treating cancer would normally give the patient a complete physical examination [R. T. p. 109], including a blood test [R. T. p. 114]. Tumors should be measured to determine if a patient is improving [R. T. p. 116].

Dr. Jesse L. Steinfeld had the opinion that the alleged anti-cancer effect of Laetrile was worthless. There has never been in his opinion a single verified report of even one cancer cure of Laetrile. There is no evidence that Laetrile has any value in even shrinking tumors, much less curing them [R. T. p. 149].

Steinfeld's opinion—based upon the academic, medical and scientific community opinion [R. T. p. 279], and on verbal discussions and writings [R. T. p. 281]—was that Laetrile is worthless [R. T. p. 287]. It has neither curative nor palliative value in the treatment of patients with cancer [R. T. p. 296]. The California Medical Association [R. T. p. 290], the California Advisory Cancer Council and the Department of Public Health, The Federal Food and Drug Administration [R. T. p. 290], the National Cancer Institute, the American Cancer Society [R. T. p. 291], and the deans of the medical schools at the University of Southern California, the University of California at Los Angeles, Stanford University, University of California, Loma Linda, and California College of Medicine [R. T. p. 290] have the opinion that Laetrile is without value. In Steinfeld's

opinion, no medical school teaches that Laetrile is of value in the treatment of cancer [R. T. p. 291].

Not one principal research center accepts Laetrile as having a curative or palliative effect on the treatment of cancer [R. T. p. 295].

Dr. Nathan Friedman conducted laboratory tests to determine whether Laetrile had any anti-tumor effect upon animals [R. T. p. 439]. The tests conducted between October 5 and November 10, 1952, led him to the conclusion that Laetrile had no anti-tumor effect on animals [R. T. p. 440]. The test results on the twelve mice revealed that the tumors that were untreated had grown unchecked just as the tumor that had been treated with Laetrile had grown unchecked [R. T. p. 443].

The Theory upon which Laetrile is based is that an enzyme breaks down the amygdalin. This releases cyanide gas that comes out and kills the cancer cell [R. T. p. 451].

Dr. Kenneth Ernst testified about a hearing on June 5, 1964, at the State Office Building in Los Angeles regarding the treatment of cancer by the appellant [R. T. p. 726]. At the hearing the appellant stated he would use surgery and radiation in all cases of early cancer [R. T. p. 735]. In Ernst's opinion, treatment with Laetrile would not be a doctor exercising his best judgment with a view to helping the patient [R. T. p. 747]. A doctor who never attempted to measure the progress of the disease would not be exercising his best judgment [R. T. p. 752]. Ernst testified that Laetrile had been tested by the American Medical Association in the 1950's, the Cancer Advisory Council in the 1960's [R. T. p. 755], by Dr. Paul Kirk, by Dr.

Friedman in the 1950's and by Dr. De Ome in the 1960's [R. T. p. 756].

The conclusion of the Calfornia Cancer Commission was that Laetrile had no effect on the tumors [R. T. p. 757]. Ernst had never heard of a single verified person whose tumor or cancer had been reduced at all by Laetrile [R. T. p. 762]. Ernst did not believe that the enzyme would break down the amygdalin [R. T. p. 805]. Laetrile had no value in any reported test [R. T. p. 872]. Laetrile had been tested in an effort to protect the public from a remedy which is of no value [R. T. p. 876]. It would not be good medical and scientific practice to give Laetrile to persons who are suffering from cancer [R. T. p. 877].

Dr. John Mehl conducted tests with Laetrile [R. T. p. 1010]. The experiments did not give any indication that beta-glucuronidase resulted in the release of cyanide from Laetrile [R. T. p. 1011]. The only time cyanide was released was when the Laetrile was boiled continuously for approximately three hours with 10 per cent hydrochloric acid [R. T. p. 1017]. Cyanide would kill any living organism [R. T. p. 1037].

Dr. Steinfeld repeatedly stated that it would be important for treatment that the doctor review all counts, X-ray, slides, all previous therapy as well as conducting a complete history and physical examination [R. T. p. 1104, p. 1117, p. 1168]. The diet of the patient, in Steinfeld's opinion, does not play an essential part in the treatment of cancer [R. T. p. 1148].

Dr. Brook testified that a bone marrow aspiration would be necessary to determine the type of leukemia [R. T. p. 1320]. In Brook's opinion a doctor who did

what the appellant did would not be engaged in research [R. T. p. 1404].

Tobias Flores was suffering from chronic granulocytic leukemia [R. T. p. 1362]. Leukemia is the abnormal, uncontrolled, overgrowth of the white cells [R. T. p. 1318]. Cancer is the name applied to a group of diseases in which there is unregulated growth, in which the cells no longer obey the normal body control mechanism, and proliferate and grow and spread without regard to what normally occurs, until ultimately the spreading, growing cancer cells kill the patient [R. T. p. 56].

Flores went to the appellant's office. The appellant was recommended by Dr. Hamilton, a chiropractor [R. T. p. 556]. Flores told the appellant that he had been diagnosed as having leukemia [R. T. p. 557]. The appellant did not ask Flores what sort of leukemia it was that had been diagnosed [R. T. p. 558]. The appellant told Flores he would treat him with Laetrile [R. T. p. 559]. The appellant made reference to an Osterizer he could sell Flores at a discount [R. T. p. 560]. On May 17, 1966, the appellant indicated that Flores would have to be treated daily with an injection of Laetrile followed the second week with an injection every other day and also to take vitamins and Enzymes [R. T. p. 561].

The appellant told Flores that he could not promise a cure for cancer, but that he was confident he could cure it within a year [R. T. p. 665]. The appellant specifically said, "Well, I can't cure or promise a cure, but I am confident that I can cure." [R. T. p. 666].

Flores received a treatment on May 17, 1966 [R. T. p. 561]. On May 23, 1966, Flores received an injection

of Laetrile [R. T. p. 563]. On May 24, 1966, Flores received an injection of Laetrile [R. T. p. 570]. On that day the appellant told Flores that Laetrile would kill the white cells [R. T. p. 570]. On June 2, 1966, Flores received an injection of Laetrile [R. T. p. 571].

On June 2, 1966, Flores asked the appellant if he could buy two vials of Laetrile that could be injected by his aunt [R. T. p. 573]. The appellant sold him two vials of Laetrile [R. T. p. 709, to p. 710]. These two vials were given by Flores to Alfred Di Dio [R. T. p. 1354]. The vials were analyzed and found to contain amygdalin [R. T. p. 1558].

Virginia Vicars, who accompanied Flores as his wife on May 17, 1966 [R. T. p. 902], on May 23, 1966 [R. T. p. 905] and on May 24, 1966 [R. T. p. 907] testified that the appellant stated it would take approximately one year to clear up the leukemia condition [R. T. p. 906]. The Laetrile injections were to clear up the leukemia [R. T. p. 907].

The appellant never gave Flores a physical examination during any of his four visits [R. T. p. 573]. Vicars testified that no physicals were given on the three dates she was in appellant's office [R. T. p. 908].

On May 17, Flores paid the appellant $6.00 [R. T. p. 561]. On May 23, Flores paid the appellant $30.00 [R. T. p. 569]. On May 24, Flores paid the appellant $20.00 [R. T. p. 571]. On June 2, Flores paid $9.00 [R. T. p. 572].

On May 23, prior to the injection, Flores signed a "release" which provided, in part, that Flores realized "that such treatment and surgery is experimental in nature and offer[s] no definite promise of cure or re-

lief." The "release" further provided "that Dr. Kowan makes no guarantees or promises towards the successful treatment of (his) cancerous condition." The document concluded that "Dr. Kowan and/or assistants, associates and consultants" were released "of any legal liability" [R. T. p. 643].

The appellant never asked for a history of Flores' case. He never requested Flores' records from the Veterans Administration Hospital [R. T. p. 696]. Dr. Brooks testified that he had never talked to or corresponded with the appellant [R. T. p. 1405].

Appellant argues that "this is a 'free speech' case if there ever was one!" In *Schenck v. United States,* (1919) 249 U.S. 47, 52, 63 L. Ed. 470, 473, this court recognized that "the most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theatre. . . ." Appellee contends that under the guise of "free speech" the appellant may not *falsely* represent a substance and treatment as effective to arrest and cure cancer and disseminate a *false* advertisement of a drug.

The term "advertisement" relating to false advertising concerning drugs or devices includes oral representations. (*People v. Schmitt,* (1957) 155 Cal. App. 2d 87, 102, 317 P. 2d 673; *People v. Galway,* (1953) 120 Cal. App. 2d 45, 49, 260 P. 2d 212). Laws against false advertising are designed to protect the public who are not likely to know the facts. (*People v. Wahl,* (1940) 39 Cal. App. 2d Supp. 771, 774, 100 P. 2d 374).

In *People v. Phillips,* (1966) 64 Cal. 2d 574, 581, 51 Cal. Rptr. 225, the court made reference to Health and Safety Code Section 1714. "That section condemns as

a *misdemeanor* 'falsely to represent a device, substance or treatment as effective to arrest or cure cancer.' "

Appellee contends that appellant's "treatment" of Tobias Flores constituted a course of conduct which the State could prohibit because of the sufficiently important governmental interest of protecting the public against the disseminators of worthless drugs.

In *United States v. O'Brien,* (1968) 391 U.S. 367, 20 L. Ed. 2d 672, 679 this Court declared it "cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify the incidental limitations on First Amendment freedoms.

The Appellate Department stated that the crucial issue in this case was not the legality of Laetrile, but its effectiveness in the treatment of cancer. *"The evidence was not only substantial, but overwhelming, that Laetrile was ineffective in the treatment of cancer."*

The conviction of the appellant was not a violation of his right of free speech. Rather, appellant's conviction for his conduct in falsely representing a treatment to cure cancer and in disseminating a false advertisement regarding Laetrile was a proper exercise of the police power of the State of California in order to protect the general public from the false hopes presented to victims of cancer by disseminators of worthless drugs.

California Health and Safety Code Sections 1714 and 26286 are constitutional. They are neither vague

nor uncertain. Reasonable certainty is all that is required and a statute will be upheld if its terms may be made reasonably certain by reference to other definable sources. The complexities of the social problems dealt with by the California Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by overrefined inquiries into the meaning of words. (*People v. Weger,* (1967) 251 Cal. App. 2d 584, 590, 59 Cal. Rptr. 661; *People v. Agnello,* (1968) 259 Cal. App. 2d 785, 791, 66 Cal. Rptr. 511).

Health and Safety Code Sections 1714 and 26286 are narrowly drawn and limited to define and punish specific conduct lying within the domain of state power. (*People v. Davis,* (1968) 68 Cal. 2d 481, 487, 67 Cal. Rptr. 529.) The statutes are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. (*Cameron v. Johnson,* (1968) 390 U.S. 611, 20 L. Ed. 2d 182, 187). California Health and Safety Code Sections 1714 and 26286 are not an infringement of the First and Fourteenth Amendments.

II.

The Evidence Against Appellant Was Not the Result of an Illegal Search and Seizure.

Appellant appears to argue that his constitutional rights were violated in light of *Miranda v. Arizona,* (1966) 384 U.S. 456, 16 L. Ed. 2d 694 and *Katz v. United States,* (1967) 390 U.S. 347, 19 L. Ed. 2d 576. Appellee submits that the act of undercover agents going to the appellant's office did not constitute an infringement of the appellant's constitutional rights un-

der the First, Fourth, Fifth, Sixth or Fourteenth Amendments.

In *People v. Arnold,* (1967) 66 Cal. 2d 438, 448, 59 Cal. Rptr. 115, the court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." Custodial interrogation also occurs when a person is led to believe, as a reasonable person, that he is deprived of his freedom in any significant way. (*People v. Butterfield,* (1968) 258 Cal. App. 2d 586, 590, 65 Cal. Rptr. 765).

There was no evidence that the appellate was in custody or deprived of his freedom in any significant way. Appellee contends that the "custodial interrogation" stage was not reached at the time Tobias Flores and Virginia Vicars visited the appellant's office. Even if such a stage had been reached, it certainly is doubtful whether Flores and Vicars are "authorities" within the meaning of *Miranda.* (See: *People v. Wright,* (1967) 249 Cal. App. 2d 692, 693, 57 Cal. Rptr. 781).

As "undercover agents" Flores and Vicars were not required to advise the appellant of his rights when they entered his office. In *People v. Putty,* (1967) 251 Cal. App. 2d 991, 997, 59 Cal. Rptr. 881, the court held that the *Dorado* doctrine (*People v. Dorado,* (1965) 62 Cal. 2d 338, 42 Cal. Rptr. 169) does not extend to statements made in the course of committing the crime itself. It, therefore, was not necessary for a police officer, posing as a prospective purchaser of stolen property, to

advise the suspect, prior to the negotiations for its sale, of his constitutional rights.

This Court has recognized the use of undercover agents (See: *Lewis v. United States,* (1966) 385 U.S. 206, 17 L. Ed. 2d 312, 316). The use of Tobias Flores and Virginia Vicars was not a denial of due process or equal protection of the law. These individuals were under no obligation to advise the appellant of his constitutional rights prior to the appellant offering to use Laetrile.

Katz v. United States, (1967) 390 U.S. 347, 19 L. Ed. 2d 576, and *Alderman v. United States,* (1969) 22 L. Ed. 2d 176 are not applicable to the instant case. It is important to remember that no tape recordings were ever offered in evidence. Only oral tetimony of what was said in Vicars' presence was presented to the jury.

Vicars accompanied Flores to the appellant's office on May 17, 1966 [R. T. p. 902], May 23, 1966 [R. T. p. 905] and on May 24, 1966 [R. T. p. 907]. She had a tape recorder with her on May 17 [R. T. p. 19] which was recording sounds that were being emitted in her presence [R. T. p. 934]. When the tape was replayed on May 19, "it wasn't very audible." [R. T. p. 935]. The tape recorder was also recording on May 23. [R. T. p. 947]. The recorder did not work on May 24 because it had not been turned on [R. T. p. 949]. The tape for May 23 was "not very audible." [R. T. p. 966]. Vicars, after listening to the tapes wrote a declaration [R. T. p. 967]. These were reduced to a full statement [R. T. p. 987]. The court held that the written statements weer not admissible to the jury [R. T. p. 992], but were entered as part of the record [R. T. p. 1892].

In *Hoffa v. United States,* (1966) 385 U.S. 293, 17 L. Ed. 2d 374, 382, this court held that no constitutional rights were violated where evidence was admitted of the testimony of a paid informer as to incriminating statements made by the defendant in his hotel suite, where the informer was in the suite by invitation and every conversation which he heard was either directed to him or knowingly carried on in his presence.

In *Katz* this court held that an electronic listening and recording device constituted an unreasonable search. *Katz* differs from the instant case in that Vicars testified to what was actually said in her presence by the appellant. Vicars' testimony was properly admitted in evidence. Such testimony was not the fruit of an illegal search. The testimony did not violate *Miranda, Katz* or *Alderman.*

III.

Appellant's Conviction Was Not a Denial of Due Process of Law.

A. Sufficiency of the Evidence.

A judgment will not be reversed for insufficiency of the evidence unless upon no reasonable hypothesis whatever is there sufficient evidence to support the trier of fact's conclusion. An appellate court will assume the existence of every fact in support of the judgment that can reasonably be deduced from the evidence.

People v. Bard, (1968) 70 A.C. 1, 3, 73 Cal. Rptr. 547.

Appellant's argument that the evidence is insufficient is not supported by a review of the record. The evidence is overwhelming that Laetrile is ineffective in

the treatment of cancer. Therefore, the evidence is sufficient that the appellant falsely represented a substance and treatment as effective to cure cancer and that the appellant disseminated a false advertisement of the drug Laetrile.

B. Rulings of the Trial Court.

The appellant alleges that the trial court committed error because of its failure to read the entire testimony of Tobias Flores to the jury.

The court informed counsel that the jury requested certain portions of Tobias Flores' testimony were to be read back to them [R. T. p. 3237]. The foreman of the jury told the court that the jury wanted testimony about "the first day that he visited Dr. Kowan" reread [R. T. p. 3234]. This testimony was read to the jury and the foreman indicated no more testimony was to be read [R. T. p. 3235].

In a criminal prosecution, where the jury returned after commencement of deliberations and requested the reading of certain contradictions in testimony of a prosecution witness, the court did not err in ordering read only those parts requested and not the entire testimony of the witness. A trial judge does not have to order read any part of testimony not requested by the jury foreman. (*People v. Gordon,* (1963) 222 Cal. App. 2d 687, 689, 35 Cal. Rptr. 335).

People v. Cathey, (1960) 186 Cal. App. 2d 217, 222, 8 Cal. Rptr. 694, relied on *People v. Smith,* (1906) 3 Cal. App. 62, 68, 84 Pac. 449, for the holding that "if the jury did not wish to hear it read, the court was not required to compel them to listen to it. It may be assumed that the portion of [the witnesses'] testi-

mony which they heard included all upon which they desired to have their memory refreshed."

The courts in *Smith* and *Cathey* held that the argument the appellant is now making was without merit. The appellant was not entitled to have Flores' complete testimony reread. That is not what the jury requested.

In his brief in the Appellate Department, the appellant made further reference to 65 pages of the reporter's transcript at which the trial court allegedly made erroneous rulings. With respect to these pages plus 57 references to pages in the transcript at which the prosecutor allegedly was guilty of misconduct, the appellant did not indicate the nature of the claimed error nor the manner in which it could have prejudiced the appellant in any substantial way.

The duty of counsel in preparing an appellate brief has been stated as follows:

> "The points made in a brief must be supported by argument or citation of authority or they will not be considered by the reviewing court, but will be deemed without foundation, without prejudice to the appellant's rights, or to have been waived or abandoned. The appellate court cannot be expected to prosecute an independent inquiry to find reasons for or against the rulings of the trial court, and it is the duty of counsel by argument and the citation of authority to show why rulings complained of are erroneous. It is not sufficient merely to state the error without showing of what it consists." (4 Cal. Jur. 2d Sec. 484, pp. 318-320).

An examination of the 3250 page reporter's transcript discloses that of the claimed errors appearing on the 122 pages generally enumerated by the appellant, the trial court sustained the appellant's objection on at least 30 occasions. With respect to the trial court's rulings that were adverse to the appellant, most of the trial court's rulings were correct, some questionable, and a few erroneous. Upon examination of all the evidence, the Appellate Department was of the opinion that the errors did not result in a miscarriage of justice. (California Constitution, Article VI, Section 13; *People v. Atchley,* (1959) 53 Cal. 2d 160, 177, 346 P. 2d 764; *People v. Watson,* (1956) 46 Cal. 2d 818, 836, 299 P. 243).

C. Conduct of the Prosecutor.

Whether a prosecutor was guilty of prejudicial misconduct must be determined in the light of the particular factual situation involved (*People v. Lyons,* (1958) 50 Cal. 2d 245, 262, 324 P. 2d 556; *People v. Butler;* (1967) 249 Cal. App. 2d 799, 808, 57 Cal. Rptr. 798).

In considering the alleged misconduct, it is important to review the jury instructions. The jury was instructed that it was to be "governed solely by the evidence introduced in the trial." The jury was not to consider any statement of counsel made during the trial. The jury was not to consider any evidence that was rejected (See: Instructions Given). It must be presumed that the jury meticulously followed the instructions of the court (*People v. McNear,* (1961) 190 Cal. App. 2d 541, 547, 12 Cal. Rptr. 124).

When a jury is promptly and adequately admonished, it must be assumed that the jury heeded the

admonition (*People v. Seiterle,* (1963) 59 Cal. 2d 703, 711; *People v. Ney,* (1965) 238 Cal. App. 2d 785, 801, 48 Cal. Rptr. 265). The jury was properly admonished on numerous occasions [R. T. p. 275, p. 1612, p. 1691, p. 1692, p. 1886, p. 1908, p. 2174, p 2239, p. 2316, p. 2662, p. 2993].

It should also be remembered in reviewing the alleged misconduct of the prosecutor, a defendant must not only object but he must also ask admonition of the jury. If not, he cannot complain of its absence (*People v. Campbell,* (1965) 232 Cal. App. 2d 712, 715, 43 Cal. Rptr. 71). Though the appellant objected to some of the comments of the prosecutor, many times he failed to ask for admonition of the jury. Appellee contends that the conduct of the prosecutor did not constitute prejudicial error (*People v. Wells,* (1968) 261 A.C.A. 537, 552-553, 68 Cal. Rptr. 400; *People v. Crawford,* (1967) 253 Cal. App. 2d 524, 61 Cal. Rptr. 472; *People v. Hernandez,* (1968) 263 A.C.A. 233, 245, 69 Cal. Rptr. 464).

The Appellate Department, after an examination of the 3250 reporter's transcript, determined that it does not appear that any of the claimed errors of the court or any of the claimed instances of misconduct of the prosecutor pertained to any violations of federal constitutional rights, and hence the doctrine of *Chapman v. California,* (1967) 386 U.S. 18, 17 L. Ed. 2d 705, was inapplicable. Even applying the *Chapman* test, the court declared "*that the claimed errors were harmless beyond a reasonable doubt.*"

Conclusion.

The appeal does not disclose that there has been a violation of appellant's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with the applicable decisions of this Court, or decided a federal question of substance not theretofore determined by this Court.

Appellees urges, therefore, that the appellant presents no substantial question for the decision of this Court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

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No. 1268

In the Supreme Court of the United States

OCTOBER TERM, 1968

MAURICE H. KOWAN,
Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Respondent.

On Appeal From The Appellate Department, Superior Court, Los Angeles County, California — Case No. CR A 7658.

BRIEF OPPOSING MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL

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In the main, appellee's motion avoids the grave and substantial Constitutional questions presented to this Court, with lengthy argument being devoted to matters irrelevant to these issues.

For example, appellee states (page 4 of its motion)—"Tumors should be measured to determine if a patient is improving". Since the State's paid informer-witness, Flores, had leukemia, a condition which is a blood disease, this reference is certainly of no pertinency to the "criminal" statements allegedly made by Dr. Kowan to Flores.

While not attempting to refute defendant and appellant's right to freedom of expression and opinion as a Doctor, appellee attacks Dr. Kowan's alleged shortcomings in his procedures of treatment as to informer witness Flores. Flores was not a bona fide patient, of course, nor did he actually seek medical treatment from Dr. Kowan, merely seeking to institute a prosecution against the Doctor.

And, whether or not, for example, appellant had in fact requested Flores' records of previous treatment from a Veterans Administration Hospital could have no bearing whatsoever upon Dr. Kowan's expressions concerning "Laetrile." It is of interest, nevertheless, and contrary to what appellee states, that Dr. Kowan and his office staff did repeatedly attempt to obtain these records (Reporter's Transcript, pages 1633, 1634, 1643, 2917, and 2927), understandably receiving no cooperation from Flores.

Appellee also urges that the un-Constitutional intrusion by the State upon Dr. Kowan's private premises, and unauthorized use of electronic "eavesdropping" equipment to gather evidence against him should be dismissed and sanctioned by this Court simply because the tape recordings obtained were not in themselves offered in evidence, and even though it is an obvious fact that the "fruits" derived therefrom were presented to the jury in the form of testimony.

Other various instances wherein appellee has failed to meet the issues involved herein could be cited by appellant. Suffice it to say, however, that its failure to do so necessarily confirms the validity and substance of the very substantial Constitutional issues before the Court.

No Justification Concerning Prosecutor Misconduct

It is true, of course, as appellee states, that the jury herein was instructed to be governed by the evidence introduced at the trial. Appellee contends that this automatically erased all passion or prejudice created by any prosecutor misconduct. It is respectfully submitted that no instruction could possibly have remedied the denial of a fair trial herein caused by Prosecutor Reiner's gross misconduct. As was observed in a recent decision of this Court (*Bruton* v. *United States,* 391 U.S. 123, 129, 88 Supreme Court 1620, 1624, quoting an opinion by the late Mr. Justice Jackson):

> "A naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Appellee further seeks to justify the prosecutor's misconduct on the premise that Court admonitions to the jury can obliterate it, or if no request has been made for an admonition the misconduct then becomes permissible and proper. As to this cause, no admonition to the jury could, or did, have any such effect. Nor, were defendant and appellant's repeated objections to such misconduct, or motions for mistrial, of any benefit.

Even in the absence of any objections, whatsoever the circumstances herein nevertheless would amply warrant intervention of this Court to protect Dr. Kowan's right to a fair and impartial trial, free of passion and prejudice.

In the case of *Viereck* v. *United States,* 318 U.S. 236, 247, and 248 (cited hereinbefore in defendant and appellant's Jurisdictional Statement, at pages 7 and 16), the remarks of the United States Attorney therein were considered so prejudicial and detrimental to the defendant's right to a fair trial, that it was held that the trial judge should have stopped them without even waiting for any objection.

Misstatements Concerning Laetrile

Appellee's motion is replete with misstatements concerning the nature of the record herein as it pertains to the cancer therapy, "Laetrile". For example, it is stated (page 5) that the California Cancer Advisory Council tested Laetrile, whereas the Council never tested Laetrile as to even one cancer patient. Likewise, no State witness had ever employed Laetrile as to any cancer patient. The prosecution did introduce a 1963 report (Peoples Ex. 5) of the Council based upon 44 cases of terminal cancer patients treated by *outside physicians* who were unanimous in their endorsements of Laetrile. These physicians reported that *64.7%* of the patients were improved by Laetrile. Dr. Kenneth Ernst, executive head of the Cancer Advisory Council, who testified concerning the report, and cited by the State in its motion as "expert" concerning Laetrile, acknowledged on cross-examination that he had never seen any of these patient reports, cases, or any other report, nor had he personally examined the records. (Reporter's Transcript, page 860)

Appellee's motion is silent concerning favorable results achieved with Laetrile as to many cancer patients. Dr. Ernesto Contreras, a scientist who testified for the defense, clinical pathologist and hematologist, and Professor

of histology and pathology, testified as to his favorable experience with Laetrile in treating approximately 500 cancer patients. Similar favorable results were attested to by other defense experts, and by Dr. Kowan himself. One patient treated by Dr. Kowan (Ezra Laury) had been afflicted with a most serious type of leukemia (known as aleukemic leukemia), his condition having improved dramatically under Laetrile therapy (Rep. Tr., pages 2922, 2924, 2926).

Appellee also ignores the international recognition granted to Laetrile by prestigious scientific organizations such as the International Union against Cancer (see pages 11 and 12 of defendant and appellant's jurisdictional statement herein). Obviously appellee would hesitate to argue that it is "criminal" for Dr. Kowan to make favorable professional statements concerning a therapy endorsed by some of the leading Doctors of the World.

In view of what the entire record herein reveals, how can appellee possibly contend that Dr. Kowan's expressions of opinion concerning Laetrile constituted a "crime" under the statutes herein challenged by defendant and appellant?

No Due Process Accorded under State's Own Regulation

As previously noted in the Jurisdictional Statement herein, defendant and appellant contends that Sections 1714 and 26286 of the California Health and Safety Code are per se unconstitutional. He also contends that the procedures employed against him under said statutes violated his Constitutionally-guaranteed rights. The State, in its Health and Safety Code, having provided detailed administrative procedures to protect rights of physicians thereunder before any doctor could be barred from recommending a cancer therapy, he was entitled to a full hear-

ing on the merits of the therapy, to be followed by a formal "cease and desist" order in the event of an adverse ruling, the order being subject to subsequent court review. Then, and only then, could a doctor be deemed "on notice" that his recommendation of a specific therapy could violate any law. No "cease and desist" order was ever obtained against Dr. Kowan as to Laetrile.

At page 3 of its motion, appellee purports to respond to these issues by citing a regulation (Section 10400.1(d), Title 17, Chapter 5, sub-Chapter 2, Article 2, California Administrative Code), which from the partial quotation set forth would apparently have barred Dr. Kowan, without notice or hearing, from expressing favorable professional opinions concerning Laetrile. However, the portion of the regulation deleted by appellee from its motion clearly shows that Dr. Kowan was entitled to such due process, it being provided therein that the State first should "take appropriate steps to cause such person to *cease and desist* from such representation . . ."

Thus, the very regulation relied upon by appellee precisely validates and supports the contentions of defendant and appellant.

Presumption in Favor of Free Communication

There is always a presumption in favor of freedom of opinion and communication. Citing this Court's opinion in *New York Times Co.* v. *Sullivan,* the U. S. Court of Appeals for the District of Columbia (*Liberty Lobby, Inc.* v. *Drew Pearson* (1968), 390 F2d 489, 491) recently stated, apropos of the case at bar:

> "While the right of expression and publication is not absolute, *the balance is always weighted in favor*

of free expression and tolerance for error is afforded; some utterances are protected not because of their merit or truth but because a free, open society elects to take a calculated risk to keep expression uninhibited." (Emphasis added)

Conclusion

Appellee presents no valid reason why this Court should deny the appeal herein. Defendant and appellant respectfully submits that grave and substantial Constitutional issues herein are properly before this Court. He urges that appellee's motion shall be denied, and that this Court shall reverse the judgment below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

KOWAN *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 1268. Decided June 2, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.